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No. 79-1763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE CHLORINE INSTITUTE, INC., *et al.*,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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The brief in opposition contends that heavy, if not exclusive, reliance by the court of appeals upon extra-record evidence and upon post-hoc rationalization of agency counsel is harmless. It is further contended that administrative agencies may "correct" their regulations without rulemaking after seven and one-half years of reasonable reliance by affected parties. These contentions present substantial issues in administrative law which should be clarified by a decision of this Court.

1. An Agency Order Must Be Upheld, If At All, On The Same Basis Articulated In The Order By The Agency Itself.

The decision of the court of appeals is based primarily upon a conclusion that a ceiling standard for chlorine provides greater protection to employees than does a time-weighted average standard. The brief in opposition says that this conclusion is "simply a matter of unassailable good sense." (Br. 9.) This is a far cry from a finding by the agency, based on evidence. It wholly overlooks the fact that there was no evidence before the agency on this question, and the conclusion was never drawn by the agency. It was a post-hoc rationalization of agency counsel first raised on review.

In this regard, the conclusion of the court of appeals was drawn in direct conflict with the holding in *FPC* v. *Texaco,* 417 U.S. 380, 397, and the holdings in the numerous other decisions of this Court, and other circuits, cited in the petition. (Pet. 8-10.)

Similarly, the court of appeals decision held:

> OSHA has found that ceiling limits provide greater protection than TWAs and the record discloses substantial evidence in support of this conclusion. (Pet. App. 10a.)

The plain fact is, however, that no such finding or conclusion was ever made by OSHA. The "substantial evidence" cited by the court was a letter written by an Assistant Secretary of Labor after the petition for review was filed in the court of appeals. (Pet. 27a-32a.)

The brief in opposition seeks to rationalize, post hoc, not only the agency order, but the court of appeals decision as well. The contention is that the *court of appeals'* conclusion that ceiling limits provide greater

protection than TWAs need not rest on the extra record materials cited by the court as substantial evidence, but can be rested, as already observed, on "unassailable good sense." (Br. 9.) This, of course, is simply a statement that a crucial fact may be found without any evidence in the record. In any event, the conclusion was that of the court and of agency counsel. The agency never made such a determination, and had no basis for doing so.

2. Respondents' Reliance Upon *DOE* v. *Mobil Oil Corporation* Is Misplaced.

The brief in opposition relies upon the refusal of this Court to grant certiorari in *Mobil Oil Corporation* v. *DOE,* 610 F.2d 796 (TECA, 1979), *certiorari denied,* May 12, 1980, No. 79-1365. Respondents' reliance upon this action is misplaced for two reasons.

First, the holding of the Temporary Emergency Court of Appeals there involved was that an administrative agency could not, under 5 U.S.C. 533(b)(B), change its regulations without rulemaking by claiming that an error had occurred in the initial promulgation. To the extent that the *Mobil* case is relevant here, a clear conflict exists between the TECA and the court of appeals decision here at issue. This conflict presents a question which deserves review by this Court.

Second, in *Mobil* the hiatus between the initial promulgation on April 3 and "correction" on April 30 was a brief 27 days. In the instant case the hiatus was seven and one-half years. In the petition for a writ of certiorari in *Mobil,* the Solicitor General stated:

> We do not contend that such amendments may be made after a relatively long delay or after reliance is reasonably placed on the rules as originally

> promulgated. At some point, the agency must be deemed to have intended to adopt its actual statement of policy, and those who have relied thereon ought to have an opportunity to comment on any revisions. (Pet. 15, fn. 12.)

The instant case presents just such a situation of long and reasonable reliance.[1]

The brief in opposition also contends that petitioners had no basis for reasonable reliance upon the standard for chlorine as promulgated. It is suggested that a cryptic reference to the source of the standard[2] should have put petitioners on notice that the regulation was erroneous.

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[1] Respondents state that petitioners did not raise the issue of the agency's authority to change its regulations, after long delay and reasonable reliance, without rulemaking, on the grounds that an error had occurred in the initial promulgation. Specifically, it is stated: "Petitioners did not raise the issue in their petition for rehearing in the court of appeals." (Br. 11, fn. 8.) This statement is incorrect. Even a cursory glance at the petition for rehearing (which has been filed by the Government with the Clerk of this Court) reveals that the issue of "good cause" under 5 U.S.C. 553(b)(B) after widespread reliance for seven and one-half years was extensively argued. (Petition for Rehearing, 4-5, 12-14.)

[2] As indicated at p. 4 of the Government's brief, this source was indicated as "41 C.F.R. 50-204.50," hardly a model of clarity. Moreover, if one had pursued this reference, he might quite rationally have concluded that it was in fact the "error" in the regulation, which was in fact wholly clear and explicit as to the standard adopted.

If petitioners were unreasonable in their reliance upon the regulation, they were not alone in their folly. The Secretary of Labor relied upon the time-weighted average standard in citing one employer for its violation. *Secretary of Labor* v. *FMC Corporation,* 2 OSHC 3216 (1974). In addition, the National Institute of Occupational Safety and Health relied upon the time-weighted average standard in its criteria document of May, 1976. (R. 301.)[3] Clearly, the long reliance by petitioners upon the time-weighted average standard was completely reasonable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] "R." refers to the certified portions of the record filed with the court of appeals. A copy of the record is currently lodged with the Clerk of this Court.